STATE OF ALASKA

IBLA 77-327 Decided February 6, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting in part State selection application F-024584.

Affirmed.

1. Patents of Public Lands: Effect

Like a patent, the effect of the issuance of a Native allotment, even if issued by mistake or inadvertence, is to transfer the legal title from the United States, and to remove from the jurisdiction of the Department the resolution of disputes concerning rights to the land.

APPEARANCES: Thomas E. Meacham, Esq., Assistant Attorney General, State of Alaska, Anchorage, for appellant.

OVERRULED: Charlie George, 44 L.D. 113 (1915).

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The State of Alaska has appealed from a March 16, 1977, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting in part a State selection application as to that portion of the selection conflicting with the Native allotment of Solomon Peter, for which certificate of allotment No. 50-73-0206 issued May 30, 1973.

The record shows that on December 11, 1959, the State of Alaska filed two selection applications, F-024574 and F-024584, covering all the land in protracted T. 1 S., R. 6 W., Fairbanks meridian. The selections were tentatively approved to the State on January 24, 1961.

On March 11, 1966, Solomon Peter filed a Native allotment application for a tract of land containing approximately 80 acres located within protracted T. 1 S., R. 6 W., serial No. F-027071, later identified as U.S. Survey 4448C.

On July 27, 1972, patent No. 50-73-0016 was issued to the State of Alaska under serial Nos. F-024574 and F-024584 for Tract A of T. 1 S., R. 6 W., Fairbanks meridian, Alaska, containing 22,656.1 acres by exterior boundary survey, and both selection case files were closed of record. The land in the Native allotment application of Solomon Peter was never specifically rejected from the selection applications, nor was it included in the patent to the State, having been segregated from "Tract A" by U.S. Survey 4448C in the interim.

BLM had proceeded to examine the allotment for which Peter had applied. Having found sufficient evidence of use and occupancy to establish a valid claim, BLM subsequently issued a "certificate of allotment" May 30, 1973, with oil and gas reserved to the United States. Subsequently, BLM admitted error in failing to notify the State of Alaska of the conflict prior to issuance of that allotment certificate, but pointed out by the March 16 decision that the lands were no longer under the jurisdiction of the United States. State selection application F-024584 was reinstated for the purpose of clarifying the conflict with Solomon Peter's allotment and confirming the tentative approval of the State's selection as to the oil and gas reserved from the conveyance to Peter.

The State has appealed, charging that it received no notice of the conflicting allotment claim until the decision of March 16, 1977, and therefore, the allotment was erroneously issued and should be cancelled. The State argues that the Board decision in John Nusunginya, 28 IBLA 83 (1976), places the burden on BLM to initiate a contest proceeding against a later-filed Native allotment application where the State may appear as an interested party. 1/

[1] This case is, in essence, a replication of the circumstances recently encountered by this Board in State of Alaska, 35 IBLA 140 (1979). There we found, "The 'Certificate of Allotment' is regarded as the equivalent of a 'Patent' except for [the] restraint on alienation of the land." 35 IBLA 141, n.1. Accordingly, we held that the issuance of a certificate of allotment, like the issuance of a regular patent, operates to divest the Department of the Interior of jurisdiction of all disputed questions concerning rights to the land.

However, upon taking up the instant appeal, some doubt was engendered concerning the propriety of our earlier holding, the question being, "Is a certificate of allotment really the equivalent of a patent for all purposes material to this appeal?" We now find that the answer is not nearly so well defined as we had previously supposed. The regulation, 43 CFR 2561.3, provides:

1/ This argument was recently refuted in State of Alaska, 41 IBLA 309 (1979), and will not be addressed here.

§ 2561.3 Effect of allotment.

(a) Land allotted under the Act is the property of the allottee and his heirs in perpetuity, and is inalienable and nontaxable. However, a native of Alaska who received an allotment under the Act, or his heirs, may with the approval of the Secretary of the Interior or his authorized representative, convey the complete title to the allottee by deed. The allotment shall thereafter be free of any restrictions against alienation and taxation unless the purchaser is a native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions. [Emphasis added.]

This strongly suggests that while the Secretary reserves the right to allow or refuse the allottee's application to convey the land, the land is the property of the allottee, so as to preclude any power in the Secretary to deprive him of it and grant it to another. However, the regulation alludes only to "an allotment" and makes no reference to the instrument of conveyance which creates it.

Turning for historical reference to a Departmental publication, Circulars and Regulations of the General Land Office, Jan. 1930 ed., we find the following concerning Alaska Native allotments, at page 225:

RECORD OF APPROVED ALLOTMENTS -- CERTIFICATE TO ALLOTTEE

22. A schedule of all approved allotments shall be kept of record in the General Land Office; and, as the act makes no provisions for a patent, a certificate will issue showing the approval of the allotment (and the survey thereof, if surveyed) for delivery to the allottee.

This indicates that the certificate of allotment was the motive instrument by which the allotted land became "the property of the allottee and his heirs in perpetuity," at least in 1930. However, reference to BLM Manual instructions, V BLM 2A.5 (Rel. 154, 12/29/58), reveals an entirely different procedure involving two separate instruments entitled, respectively, the "Allotment Certificate" and the "Native Allotment." These documents are incorporated in the Manual as Illustrations 4 and 5. According to these instructions, when the Classification Officer reported that the allotment application was acceptable, the Adjudication Officer would issue an "Allotment Certificate," utilizing the familiar "Final Certificate" form with appropriate modifications effected by typewritten insertions and strike-outs. Then, according to the instructions, there was further processing of the application by the Classification Officer and the

Engineering Officer. Upon completion of their work, the Patent Issuing Officer issued the instrument entitled "Native Allotment." This was the instrument which, according to its text, declared that "the land above described shall be deemed the homestead of the allottee and his heirs in perpetuity."

Inquiry of BLM's Alaska State Office discloses that the present practice does not include issuance of the interim "Allotment Certificate." Instead, when the Native's application is finally approved, he or she is given the instrument entitled "Native Allotment." The confusion arises out of the fact that BLM personnel commonly refer to this document as the "Certificate of Allotment," which would suggest -- erroneously -- that it was the "Allotment Certificate" or Final Certificate that the Native receives. The difference is significant, as the issuance of an "Allotment Certificate" or "Final Certificate" does not operate to pass the title, whereas the "Native Allotment" does so.

In the case before us the Native applicant, Solomon Peter, received the document styled "Native Allotment," although the BLM decision refers to it as "certificate of allotment No. 50-73-0206," 2/ and elsewhere as "the final certificate."

In his excellent work, Handbook of Federal Indian Law (4th ed. 1945), Felix S. Cohen at page 109 describes the distinction between the estates created by a "trust patent" to an Indian allottee and the alternative restraint on alienation:

> At the present time restrictions upon alienation of allotments are in general of two kinds: (1) the "trust patent" and (2) the "restricted fee."
>
> (1) Under the General Allotment Act and related legislation, * * * the allottee receives what is called a "trust patent", the theory being that the United States retains legal title to the land. * * *
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> * * * * * * *
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> (2) A second form of restriction upon the alienability of allotments involves the holding of a legal fee by the allottee under a deed which prevents alienation without the consent of some administrative officer, usually the Secretary of the Interior. [Emphasis added.]

The foregoing distinction is expressed in current Departmental regulations at 25 CFR 121.1, under "Definitions":

> (c) "Restricted land" means land or any interest therein, the title to which is held by an individual

2/ This number appears to conform to numbers in the patent series.

Indian, subject to Federal restrictions against alienation or encumbrance.

(d) "Trust land" means land or any interest therein held in trust by the United States for an individual Indian.

Taking together the language of the regulations in Titles 25 and 43, Code of Federal Regulations, the statements by Cohen, and the language of the "Native Allotment" instrument, we conclude that an allotment of this type falls within the foregoing description of "restricted land," so that once the land is allotted, title is held by the allottee rather than by the United States. This conclusion is reinforced by consideration of the second sentence of 43 CFR 2561.3, supra, which provides that "a native of Alaska who has received an allotment under the Act * * * may with the approval of the Secretary * * * convey the complete title to the allotted land by deed." Notice that it is the allottee who has "the complete title to the allotted land," and it is the allottee who is the maker of the deed by which the land may be conveyed. All that is required from the Secretary is approval. Approval is not title, so it must be presumed that title was vested in the allottee at the time the allotment was granted.

Based upon this analysis we conclude that aside from our ambiguous reference to a "certificate of allotment," our finding that an allotment "is regarded as the equivalent of a 'Patent' except for [the] restraint on alienation of the land," as stated in State of Alaska, supra, was correct. The Departmental decision holding to the contrary, Charlie George, 44 L.D. 113 (1915), is hereby overruled.

Applying this finding of law to the case at hand, we hold that the effect of issuing a Native allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove from the jurisdiction of this Department the resolution of disputes concerning rights to the land, even if the conveyance by the Department was wrongfully accomplished through inadvertence or mistake while disputed matters of fact concerning the priority of claimants to the land were then pending unsettled before the Department. Germania Iron Co. v. United States, 165 U.S. 379 (1897). In so holding, the Supreme Court said:

> Congress has entrusted to the land department the disposal of the public lands, and has invested the officers of that department with exclusive jurisdiction over many things in connection with such disposition. Their determination in respect to questions of fact in all matters of contest is exclusive and final. The issue of a patent is in effect the final determination of that department in favor of the patentee and against the contestants of all disputed questions of fact -- a determination which it

> is not the function of courts to review except upon conditions of fraud, etc., which permit courts of equity to investigate and pass judgment upon all determinations of all tribunals. By inadvertence and mistake a patent in this case has been issued, and the effect of such issue is to transfer the legal title and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact. [Emphasis added.]

Id. at 383.

> We are of the opinion that the ruling of the Circuit Court and the Court of Appeals was correct; that the matters of fact involved in these contests should be settled by the land department; that when through inadvertence and mistake a patent has been wrongfully issued, by which the jurisdiction of the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere and restore such lost jurisdiction, to do which it becomes necessary to cancel the patent. [Emphasis added.]

Id. at 385. Other cases directly relying thereon include Southern Pacific R. Co. v. United States, 51 F.2d 873 (9th Cir. 1931); Sage v. United States, 140 F. 65 (8th Cir. 1905); United States v. Lavenson, 206 F. 755 (D. Wash. 1913).

The precepts set forth in Germania Iron Co. are few and simple, and they have guided this Department in similar cases for more than 80 years. They are:

1. That where the Department in the exercise of its entrusted power over the public land conveys title out of the United States, it loses its jurisdiction to administratively cancel the conveyance and recover the title.

2. In such instance the Department is deprived even of the jurisdiction to inquire into and consider disputed questions of fact concerning the priority of other claimants to the land.

3. In an appropriate case, a court of competent jurisdiction may restore the jurisdiction of the Department so that it can readjudicate the question of entitlement, but to do so the court must cancel the patent (or other instrument of conveyance).

Because by divesting the Federal title the Department is deprived even of the jurisdiction to make "inquiry into and consideration of such disputed questions of fact," this Board lacks authority to order a fact-finding hearing pursuant to 43 CFR 4.415. Neither does the

Department have jurisdiction to hear and decide a private contest proceeding brought by an adverse claimant, as was suggested by Judge Burski in his dissenting opinion in Berthyn Jane Baker, 41 IBLA 239, 244 (1979) (dissent). Without jurisdiction, no tribunal of this Department could properly convene a proceeding, compel attendance or otherwise conduct a proper proceeding. In short, the lack of subject matter jurisdiction precludes any such action.

The Board of Land Appeals is a quasi-judicial tribunal whose only function and obligation is to consider and decide appeals over which it has jurisdiction. 43 CFR 4.1(b)(3). In cases where the evidence of fraud or gross error or injustice is uncontroverted or so strong as to leave little doubt that litigation should be initiated to cancel, this Board may recommend to the Secretary, through the Solicitor, that the matter be referred to the Department of Justice so that it might bring suit. See, e.g., Dorothy H. Marsh, 9 IBLA 113 (1973). But, lacking jurisdiction, it is neither the duty nor the exclusive prerogative of this Board to do so. Virtually anyone can make such a recommendation.

We are obliged to notice that on August 8, 1979, the District Court for the district of Alaska rendered its decision in Aguilar v. United States, Civ. No. A-76-271, a judicial review of our holding in Ethel Aguilar, 15 IBLA 30 (1974). The case involved the patenting of land to the State of Alaska while the Native allotment applications of Aguilar and others for the same land were still pending. The Native applicants appealed to this Board, which declined to hear oral argument and denied jurisdiction. The district court remanded the case to the Department "with instructions to adjudicate [the Native's] substantive claims of entitlement pursuant to all applicable procedures." The patents held by the State were not canceled, and the opinion of the court makes no reference to the holding in Germania Iron Co. or any of its judicial derivatives. As of this writing the decision is not yet final. In any event, the rationale of the decision focused strongly on the special relationship of the Federal Government to Alaska Natives, and it is uncertain whether the court would reach the same conclusion where, as here, the roles are reversed, and it is the Native who received the title and the State is the appellant.

In his concurring opinion Judge Burski alludes to the holdings in Mary E. Coffin, 34 L.D. 298 (1905), and indicates that Everette Elvin Tibbets, 61 I.D. 397 (1954), and Heirs of C. H. Creciat, 40 L.D. 623 (1912), are in accord with the passage which he quoted from Coffin. 3/

3/ Astonishingly, although the Coffin decision was published by the Department less than 8 years after the Supreme Court's holding on the same issue in Germania Iron Co., the Coffin decision makes no reference to the Supreme Court's decision. Probably that is why the two do not seem well in accord. In this regard the Coffin decision suffers from the same infirmity as the recent decision in Aguilar v. United States, supra.

Although both Coffin and Tibbets declare that it is within the power of this Department to order hearings to obtain information relating to the advisability or necessity of bringing suit for cancellation of a patent, Creciat does not. Indeed Creciat affirmed a decision of the Commissioner of the General Land Office not to sue for patent cancellation and refusing to order a hearing at the behest of the disappointed claimants. An internal investigation had persuaded the Commissioner that such a suit would fail.

My point of difference with the concurring opinions is centered almost exclusively on what the Department properly may do when it is disclosed that it might have improvidently alienated the title to what once was Federal land under its stewardship. The answer is to be found in an examination of the functions and powers of the Department. There is a duality of functions which often have been judicially recognized. The first of these is the administrative or managerial function common to most of the agencies of the Executive Branch. The second is the quasi-judicial function. It is in the quasi-judicial mode that formal adversary proceedings are conducted, witnesses are compelled to appear, evidence is taken, a record is compiled, findings of fact and law are made, and rights are determined. The essential prerequisite to the conduct of such proceedings is jurisdiction. We think the Supreme Court has made it clear in Germania Iron Company that, having divested itself of subject matter jurisdiction by patenting the land, this Department is precluded from conducting any quasi-judicial proceeding to inquire into, review, consider or decide the rights of the respective parties.

However, this is not to say that the Department may not investigate or review the matter internally in its administrative or managerial mode in order to determine whether suit to cancel the patent should be recommended.

This is precisely what was done in Heirs of C. H. Creciat, supra. The Commissioner, upon being told by mining claimants that mineral land had been patented to a railroad in derogation of their rights, caused an investigation to be made into the facts and circumstances by the chief of the field division. Based upon the report of that employee's findings, the Commissioner decided not to recommend suit to cancel the railroad's patent, and refused to convene the hearing that the claimants requested by their petition, whereupon the claimants appealed. The issues presented by the appeal and their resolution were neatly summarized by Assistant Secretary Thompson, at 40 L.D. 624-25, as follows:

> On such report the Commissioner denied the petition for institution of suit. The appeal alleges error that petitioners have not been granted a hearing to prove mineral character of the land, and their rights have been determined unheard.

> There was no error in the Commissioner's decision. After patent the land department has no jurisdiction to try and determine a question of right to lands. The issue of patent places such questions outside the jurisdiction of the land department. No rights of petitioners in the lands have been determined, nor could they be determined by the land department so long as title is out of the United States.
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> After patent has issued, the purpose of inquiry and investigation is for information of the Department, whether proper ground exists to seek cancellation of the patent by suit. Such proceeding is not an adversary one, but is an administrative proceeding for information of the Department and may be conducted in such manner as suits its own convenience, and as is, in its own judgment, best calculated to attain its object. It determines no right of parties adversely claiming land no longer public, or property of the United States. [Emphasis added.]

Accordingly, while the Department is at liberty to conduct an investigation to ascertain whether a lawsuit should be instigated, it may not convene a quasi-judicial proceeding, compel the appearance of non-employee parties or witnesses, or make any sort of adjudication. Thus, contest proceedings are precluded, as are fact-finding procedures pursuant to 43 CFR 4.415, as jurisdiction of the subject matter is an essential element of such proceedings. Any inquiry of non-employees of this Department in the pursuit of its administrative investigation would, of necessity, be informal and voluntary on their part.

Finally, we note that the allotment in this case issued on May 30, 1973 -- more than 6 years ago. "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of issuance of such patents." 43 U.S.C. § 1166 (1976). Therefore, even were we to regard the States's claim as meritorious on its face, we would not recommend to the Secretary that he support litigation by the United States, as it appears that Peter's title is protected from such action by the statute. Moreover, even were it not for the statute of limitation, supra, we could not recommend such an action in this case. "Where the mistake in the issuing of a patent was to issue it without having afforded to a conflicting applicant an opportunity to appeal under the rules of practice of this Department from an adverse classification of the land embraced by his application, insufficient grounds exist for seeking judicial annulment of the patent." Everett Elvin Tibbets, 61 I.D. 397 (1954). Essentially, this is the situation presented by the instant appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

I have no problem with the conclusion that an allotment is the equivalent of a patent, but I cannot accept the proposition that the issuance of an instrument of conveyance of the fee by the Bureau of Land Management strips the Department of authority to hold hearings concerning the circumstances attendant upon patent issuance.

To hold otherwise is to place the Department on the horns of a dilemma -- it could recommend to the Department of Justice that suit be instituted to cancel a patent, without a sufficient factual predicate in some cases to establish that the action is warranted, or it could refrain, from referring the case to Justice because in the absence of a hearing it did not have a sufficient basis to recommend suit.

Neither of these alternatives affords a satisfactory modus operandi.

Judge Stuebing's opinion places more store upon the language of Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897), that "the effect of such issue [of patent] is to transfer the legal title, and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact."

Judge Stuebing states that no hearings are proper to determine whether suit should be recommended, but that investigations may be held. But investigations are an "inquiry" within the ambit of Germania. He endeavors to draw a line of demarcation between the administrative and quasi-judicial functions of the Department, indicating his belief that hearings are appropriate only with respect to the quasi-judicial functions.

In determining whether to recommend suit to the Department of Justice, the Department of the Interior is exercising a discretionary function. How that discretion is exercised is a matter of administrative determination. While it may be true that the Department could not compel persons to appear at such a hearing, the Department would be entitled to draw appropriate inferences from the failure of any party to appear who was summoned.

I stated in my concurring opinion in Berthlyn Jane Baker, 41 IBLA 239, 242 (1979): "But I * * * do not believe that is appropriate for this Board to abdicate its responsibilities of determining whether it should recommend to the Solicitor the commencement of such [suit] by the Attorney General." I adhere to that view, but believe that even

if the 6-year statute of limitations for suits seeking to cancel patents (43 U.S.C. § 1166 (1976)) were not a bar, the principles enunciated in Everette Elvin Tibbetts, 61 I.D. 397 (1954), would militate against a recommendation for suit seeking to cancel the allotment.

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

The opinion of Judge Stuebing discusses, at considerable length, the effect of the United States Supreme Court decision in Germania Iron Co. v. United States, 165 U.S. 379 (1897), as regards the ouster of this Department's jurisdiction upon patent issuance. Because this is a matter of great import in the continuing adjudication of Native allotment applications, I wish to address this matter in some detail. 1/

There has never been any controversy over the proposition that issuance of a patent, albeit by fraud or mistake, deprives the Department of jurisdiction with respect to the land conveyed. The question which has produced the disagreement within this Board relates to the continuing authority of the Department "to inquire into" the circumstances of patent issuance. If, as all concede, the United States has the authority to initiate suit to have a patent canceled so that the Department may once again be revested with its authority over the land, it becomes necessary to examine the parameters in which the Government should act to seek judicial cancellation of a patent.

It is essential to recognize that Germania Iron Co., supra, and the cases directly relying thereon, see Southern Pacific R. Co. v. United States, 51 F.2d 873 (9th Cir. 1931); Sage v. United States, 140 F. 65 (8th Cir. 1905); United States v. Lavenson, 206 F. 755 (D. Wash. 1913), each involved procedural irregularities in the issuance of the patent. Germania Iron, for example, involved issuance of a patent while adverse claimants were pursuing appeals within the Department. The same situation was extant in Southern Pacific. In Sage, failure to note a homestead entry had led to the issuance of patent, while in Lavenson mineral patents had issued despite the pendency of a protest of the claims' validity. Thus, in every case, there was a procedural defect of record. In each of these cases the courts found that the existence of such defect, without more, was sufficient to predicate the cancellation of the patent to restore adjudicatory jurisdiction to the Department.

In Germania Iron the patentee had argued that cancellation of the patent might be useless since it was still possible for the Department to eventually determine that the patent was correctly issued to its predecessor-in-interest. Accordingly, it contended that the Department must show, as a condition of patent cancellation, that the patent ought to have issued to some other party. It was this contention that the court directly rejected. And it was to this argument

1/ I do wish to record my complete agreement with Judge Stuebing's detailed analysis of the nature of the Native allotment and its effect on the matters under consideration.

that the court's language relating to the loss of jurisdiction "to inquire into" was directed. The majority decision appears to posit a situation in which somehow an appellant must show clear fraud or injustice while at the same time this Board eschews any authority or responsibility to inquire into the existence of fraud or injustice. It seems clear to me that if the Board desires to rigorously apply Germania Iron the Board must also be constrained to recommend the initiation of suit wherever the record shows that a procedural irregularity occurred in the issuance of patent.

Judge Stuebing's standard is apparently a more stringent modification of prior Departmental holdings, such as Everett Elvin Tibbets, 61 I.D. 397 (1954), which state that the Department will not generally recommend that the Attorney General initiate suit unless (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. The key determinant in those cases in which the Department has declined to recommend suit has been the absence of any "legal right" in the appealing party.

Thus, in Everett Elvin Tibbets, supra, the appellant was seeking review of a decision classifying land as unsuitable for homestead entry at the time that the patent issued. As that decision noted, "no personal or property rights inured to him merely upon the filing of his homestead application." Id. at 401. This situation is vastly different from the one which obtains in the Native allotment and state selection problems. Indeed, in Germania Iron the equity which the court found justified the bringing of the suit was that through procedural errors the rights of private individuals might have been injured. It required no showing of gross error. I do not believe this Board should enforce such a requirement, particularly where it is also denying an appellant an opportunity to provide the evidence of error.

I strongly disagree with Judge Stuebing's statement that "it is neither the duty nor the exclusive prerogative of this Board [to recommend initiation of a suit to annul an erroneously issued patent]." The instant case, as well as the appeal in Berthlyn Jane Baker, 41 IBLA 239 (1979), arose from rejection of a pending application, a state selection application and a Native allotment application, respectively. The parties properly pursued an appeal to this Board, in both cases alleging erroneous issuance of a patent. The issuance of the patent in both cases was clearly a violation of both Departmental procedures and the Ashbacker doctrine. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1946). I feel that this Board is obligated to recommend judicial proceedings after a determination that the patent was issued improperly. That this Board has the authority to so recommend is clear. See Dorothy H. Marsh, 9 IBLA 113 (1973).

See also Sky Pilots of Alaska, Inc., 40 IBLA 355 (1979). The safeguarding of the administrative process ought to rank high in this Board's concerns. I think it clear, under the strictest reading of Germania Iron that this Board's decision in Berthlyn Jane Baker, supra, was erroneous, and I would overrule it forthwith. 2/

The position of Judge Stuebing would overrule, sub silentio, a number of Departmental precedents including a decision of Secretary Hitchcock rendered in Mary E. Coffin, 34 L.D. 298 (1905). In that case, Secretary Hitchcock stated:

> While the land department by issue of patent loses jurisdiction to adjudicate the rights of the parties to the land, yet there remains a duty to be performed by the Department when its aid is sought by a request to bring suit for cancellation of a patent. * * * It is the duty of this Department, before asking aid of the Department of Justice for correction of its errors, to ascertain whether the interests of the United States, or of some party to whom it is under obligation, have suffered by its own misprison. * * *
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> It is, moreover, one of the established powers of the land department to order hearings in such cases for obtaining information necessary for its actions, as well after patent has gone out to determine the advisability or necessity of bringing suit for cancellation, as to determining questions arising as to rights in public lands not patented.

2/ Upon reflection, I would also partially modify my dissent in Baker, supra. Therein, I had recommended that the State of Alaska should be afforded an opportunity to contest the Native allotment, failing in which the Department should recommend that suit be initiated. I now believe that that recommendation was in error for two reasons.

First, as the discussion in the text indicates, I am now of the belief that having once been presented with clear evidence of procedural error below, this Board should have immediately recommended suit, rather than remand the matter for further action.

Second, my dissenting opinion also envisaged a contest proceeding under 43 CFR 4.450-1. I do agree with both Judge Stuebing and Judge Fishman that until such time as the jurisdiction to decide between competing claims to land is restored to the Department, we lack jurisdiction to determine the rights of the claimants. Where a hearing is necessary to determine whether a substantive error has occurred in the issuance of a patent, I would order a fact-finding hearing under 43 CFR 4.415. I think this is clearly the procedure utilized in the Coffin and Tibbetts cases discussed infra.

34 L.D. at 300-01. Accord, Everett Elvin Tibbets, supra; see also Heirs of C. H. Creciat, 40 L.D. 623 (1912). I feel that the Coffin procedure demonstrably represents the better view of the law, particularly where the Board is declining to recommend the initiation of a judicial suit owing to a perceived deficiency in an appellant's showings.

My difficulty in accepting the view that Germania Iron prohibits any hearing by the Department going to the circumstances of patent issuance relates especially to those situations in which the correctness of patent issuance is disputed but there were no procedural irregularities attendant to issuance. Such a situation was presented in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), rev'g Ethel Aguilar, 15 IBLA 30 (1974). In that case, patents had issued in conformity to various state selections prior to the filing of Native allotment applications. The Native allotment applicants alleged that they had occupied the land prior to the state selection and thus BLM had erroneously issued the patents to the state. Land occupied by Natives in Alaska were not available for State selection. See Lucy S. Ahvakana, 3 IBLA 341 (1971). Thus, the contentions of the appellants, if true, would have invalidated the patents to the State. There would be, however, no procedural error in the issuance of the patents to the State since no Native allotment applications were pending at the time of patent issuance.

The problem with a strict interpretation of Germania Iron is that the Supreme Court's decision was premised, as noted above, upon the existence of procedural irregularities. As the Supreme Court subsequently noted: "In Williams v. United States, 138 U.S. 514, and Germania Iron Company v. United States, 165 U.S. 379, something more than premature action in certificate and patent was shown -- something which presented an equity entitling the United States to maintain its suit for cancellation." Southern Pacific R.R. Co. v. United States, 200 U.S. 354, 359 (1906). Thus in order for the United States to maintain a suit, it would be necessary, in the absence of procedural errors, to show substantive equities. It is difficult to see how such error can be demonstrated if the Department cannot inquire into the factual circumstances of the appeal. The situation is thus presented where an appellant's application will be rejected without inquiry as to the circumstances of patent issuance because issuance of the patent has divested the Department of jurisdiction; no suit may be brought by the United States absent a showing of equities; no equities may be shown absent an inquiry into the circumstances of issuance of the patent. If this is not a Catch 22 scenario, nothing is. The application of the procedure provided by Coffin and similar decisions seems singularly appropriate.

I think that the court's decision in Aguilar v. United States, supra, was an attempt by the court to provide the Department with a mechanism by which it could determine whether equities existed such

as would support a suit to cancel the patents. I feel that it represents the only workable way in which an intelligent basis can be provided for a determination of whether the Department should seek to have the patent canceled. If it be contrary to a literal reading of Germania Iron, I think it merely represents the district court's recognition of the maxim mutatis mutandis. It represents, as well, a judicial affirmance of the Coffin rationale which Judge Stuebing would reject.

Were it not for the fact that the certificate issued in 1973 and more than 6 years have now elapsed, I would recommend that the Government institute a suit to nullify the certificate. Since, however, the applicable statute, section 1 of the Act of March 3, 1891, 26 Stat. 1093, 43 U.S.C. § 1166 (1976), limits the time for the initiation of a proceeding to annul a patent to 6 years, and as there is no evidence of fraud in the record, I concur with the denial of this appeal. 3/

James L. Burski
Administrative Judge

3/ While I recognize that the 6-year statute of limitations has been held inapplicable when suit is brought to protect Indian and Native rights, the United States, in effect, maintains the suit based on its fiduciary duty to Indians and Natives. See United States v. Minnesota, 270 U.S. 181, 195-96 (1926); Cramer v. United States, 261 U.S. 219, 233-34 (1923). The United States owes no fiduciary duty to the State and I am aware of no precedent which would allow the United States to proceed on its behalf.